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IN THE

Supreme Court of the United States

OCTOBER TERM—1958

No. 511

DEEP SEA TANKERS, LIMITED, in its own behalf, as owner of the S. T. "RINCON HILLS", and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Petitioners,

against

The steamtug "LONG BRANCH", the RAILWAY CARFLOATS Nos. 61 and 56, CENTRAL RAILROAD COMPANY OF NEW JERSEY, the steamtugs "AJAX" and "BJAX", the sand barges "A", "B" and "C", and METROPOLITAN SAND & GRAVEL CORPORATION,

Respondents.

(and three related causes)

BRIEF OF RESPONDENT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, IN OPPOSITION TO PETITION OF DEEP SEA TANKERS, LIMITED, FOR CERTIORARI

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BRIEF OF RESPONDENT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, IN OPPOSITION TO PETITION OF DEEP SEA TANKERS, LIMITED, FOR CERTIORARI

Opinions of Courts Below.

The opinion of the District Court (CLANCY, D. J.) dismissing the libel is reported in 1956 A. M. C. 1723, in

summary form. It is not otherwise reported. Said opinion in full is printed in the petition of Deep Sea Tankers, Limited, pages 3a to 13a inclusive.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 258 Fed. (2) 757; also in said petitioners' petition, 2b to 35b, inclusive.

Questions Presented By Petitioners.

1. Where the Limitation of Liability Act denies the privilege of limitation to a shipowner held liable for damage if it occurs with his "privity or knowledge", may a court introduce the further element of intent and grant limitation on the ground that there was no "wilful fault" by the shipowner?

2. Is there privity of a shipowner which requires denial of limitation, under the Limitation of Liability Act, when a navigational error causing damage for which the shipowner is held liable results from (a) the Master's lack of knowledge of currents where the shipowner has failed to provide the vessel with charts and current tables; or (b) the fact that the mental operations of the Master were affected by his chronic hypertension which was known to the shipowner's Medical Director and by sedatives the Master was taking on his doctor's advice?

3. When a tow and its tug belong to the same owner and are being operated as a flotilla in a common venture, and the tow obstructs and interferes with the navigation of another vessel causing damage thereto, is the owner of the flotilla required under the Limitation of Liability Act to include in his limitation fund the amount or value of his interest in the tow as well as in the tug?

Statute Involved.

The statutory provision involved is Section 183(a) of the Limitation of Liability Act; 46 U. S. C. Rev. Stat. Sec. 4283, as amended:

> "§ 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."*
>
> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Statement.

The petitioners in their statement, fail to reveal that no physical contact of any kind occurred between any of the craft involved in this situation; petitioners also fail to state the fact that the wheelsman on the *Rincon Hills* was given an order of full ahead and hard left, but that he answered that order by going full ahead on the engines and turning the wheel hard right instead of hard left. In the interest of accuracy, respondent wishes to present for clarification that neither the District Court or the United States Court of Appeals held either carfloat at fault in any manner for any reason or was either carfloat at any time held to be unseaworthy for any reason whatsoever. Again, petitioners neglected to state that neither carfloat was equipped with any motive power and was incapable of steering itself in any manner.

POINT I.

The first two points assigned by petitioners as reasons for granting the writ (Pets. Brief, pp. 7-11) are a patent quibble, and a play on words.

Essentially, Petitioners' first two points constitute but one point, inasmuch as they both relate to the allegedly fatal effect the asserted lack of Charts and Tide Tables had on the availability of the limitation statutes to the harbor tug *Long Branch.*

Petitioners' *fallacious argument* runs substantially as follows.

(1) "Privity and knowledge" encompasses negligent omission as well as "wilful fault".

(2) The Second Circuit held The Central Railroad Company of New Jersey free from "wilful fault" and permitted limitation on that basis.

(3) The Central Railroad Company of New Jersey was guilty of a negligent omission in its failure to insure that the charts and tables were aboard the *Long Branch.*

(4) The Second Circuit erred in that it failed to charge The Central Railroad Company of New Jersey with the results of its "passive negligence" but substituted an erroneous standard of "wilful fault".

The glaring flaw in Petitioners' argument is that both the District Court and the Circuit Court found the third proposition to be completely *untrue.*

The three sentences immediately preceding the cited passage (Petitioners' brief, p. 11) carefully culled by petitioners from the opinion of MEDINA, C. J., reads:

> "The *Long Branch* and the *Metropolitan No. 2* each had on board a Commercial Tide Calendar giving high and low water at Sandy Hook, the Battery and Hell Gate. Taking the evidence as a whole we think both the Railroad and Metropolitan *acted reasonably* in committing the navigation of their tugs to these two men of many years experience towing in

> the very waters involved in this case without making further provision for either Charts or Current Tables. Many of the witnesses testified that it was not customary to have them on board harbor tugs'' (Petitioners' App., p. 28b). (Emphasis supplied.)

Accordingly, it is evident that both the District Court and the United States Court of Appeals found The Central Railroad Company of New Jersey free, not only from "wilful" fault, but also free from passive negligence of any nature in respect to Charts and Tables.

The standard by which negligence, either active or passive, is judged is the standard of "reasonableness".

In not "making further provision for either Charts or Current Tables" the Court of Appeals expressly found that the railroad "acted reasonably".

This finding invalidates Petitioners' entire argument, because that argument is based upon a presumption of passive negligence, which presumption the opinion of the Court of Appeals squarely rejects. In other words, the Court of Appeals found no negligence, of any nature, on the part of respondent, The Central Railroad Company of New Jersey, in connection with the alleged absence of tide tables and charts.

It is to be noted that the tug *Long Branch* was a harbor tug and did all her work right in New York Harbor. Her conduct was judged accordingly.

POINT II.

The "flotilla theory" urged by petitioners is in harmony with neither expressed legislative intent nor judicial pronouncements.

The tug *Long Branch* was found to be at fault in the opinion of the Court of Appeals for the Second Circuit. In charging the *Long Branch* with responsibility for the grounding of petitioner's vessel, the S/T *Rincon Hills*, the court permitted the respondent, The Central Railroad Company of New Jersey, to limit its liability to the value of

the tug *Long Branch*. It is contended by petitioners that, if limitation is proper, the limitation fund should include, not only the value of the tug *Long Branch*, but also the values of the carfloats *CRR of NJ No. 56* and *CRR of NJ No. 61* (hereinafter referred to as *No. 56* and *No. 61*).

In considering the merit of petitioners' contentions in this regard the exact findings of the courts below should be considered.

The District Court exonerated the carfloats *No. 56* and *No. 61* (Petitioners' App., p. 9a).

The Circuit Court noted that "the carfloats and sand scows in tow of the tugs *Long Branch* and *Metropolitan No. 2* were merely passive instruments of navigation" (Petitioners' App., p. 34b).

"But in the case before us, as in *Liverpool*, no fault whatever is attributable to the sand scows or to the carfloats. It is true that they made the flotillas more cumbersome, but it does not follow that they were at fault, and we hold that they were not." So stated the opinion of MEDINA, C. J. (Petitioners' App., p. 35b).

Having stated the conclusion that no fault could be attributed to the carfloats, the Circuit Court, relying on the clear authority which it found in the decision of this Court in *Liverpool, Brazil and River Plate Steam Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U. S. 48 (1919), exonerated the carfloats and held that, insofar as The Central Railroad Company of New Jersey was concerned, the size of the limitation fund was to be determined by the value of the tug *Long Branch* alone.

In reaching this determination the United States Court of Appeals for the Second Circuit conformed not only to the binding precedent contained in the *Liverpool* case (*supra*) but also conformed to a clearly stated legislative intent, implemented by a consistent line of authoritative judicial pronouncements.

The sufficient investment of risk capital in maritime ventures has been a continuing source of concern to our

legislature. This concern furnished the impetus which created and sustained the limitation statutes. (Title 46, Sec. 183, *et seq.*)

Richardson v. *Harmon*, 222 U. S. 96, at 103;
Hartford Accident & Indemnity Co. v. *Southern Pacific Co.*, 273 U. S. 207, 214;
Butler v. *Boston & S. S. S. Co.*, 130 U. S. 527.

In judicial furtherance of the legislative policy underlying the limitation statutes, this Court has been zealous to insure that limitation procedures are not administered "with a tight and grudging hand" (*Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589).

Fortunately for the American maritime industry a broad and liberal interpretation of the limitation statutes has been had in the various causes in the past addressed to the attention of this Court. As a result the American maritime industry enjoys a competitive position in the world's economy undaunted by the prospect of onerous and unreasonable liabilities.

Coryell v. *Philipps*, 317 U. S. 406, 412;
Just v. *Chambers*, 312 U. S. 383, 385;
Flink v. *Paladini*, 297 U. S. 59, 62;
In re East River Towing Co., 266 U. S. 355.

The stricture on the benefits of the limitation statutes which petitioners urge in their brief, *viz.*, a tugboat can tow vessels belonging to the owner of that tug only at the peril of subjecting the towed vessels to liability occasioned through no fault of the tow, represents the exact type of menace to the owners of barges, scows, lighters, carfloats and other dumb harbor vessels which this Court has striven so consistently to eliminate.

It is alleged on page 14 of the petition that England, in a case such as here concerned, bases the size of the limitation fund upon the whole flotilla, contrary to the holding in the *Liverpool* case. However, no English au-

thority is cited which establishes that an entire flotilla must be surrendered, together with the tug, in the absence of contact and fault. We find no such authority in any English decision.

The case of *The Harlow* (1922), ~~page~~ p. 175, cited by petitioners is no such authority for that proposition.

Actually, Petitioners' contention is contra to the holding of *The Harlow*.

In *The Harlow* (1922), ~~p.~~ p. 175, cited on page 15 of the petition, it was stated:

> "There was also a finding that the lightermen of the five barges were guilty of improper navigation, which was expressed in these words: 'If the lightermen had been, as they ought to have been, on board their lighters, the lighters could have been cast off, and ought to have been cast off, in such a time as would, if it did not avoid the collision between the barge and the *Dalton*, at any rate have greatly lessened the damage done to the *Dalton*'" (pp. 176-177).

However, in that case, the Appeal Court held that the limitation fund was to be determined only by the tonnage of the tug *Harlow* and the barge *Silver* and the barge *Sokoto*. That Court expressly refused to extend the limitation fund so as to include the tonnage of the entire flotilla of five barges. In other words, that Court found the barges *Silver* and *Sokoto* guilty of negligence and of contributing to the *Dalton's* damage by actual contact or momentum. Specifically, it refused to include the other three barges in the flotilla in the limitation fund; they, not being in contact were not required to contribute to the fund.

It is submitted that this decision in the *Harlow* case expressly rebuts petitioners' contention that the value of the entire flotilla must be surrendered. The English court there expressly refused to compel the surrender of the three barges which did not either collide with the damaged vessel or worsen the damage by their force and momentum.

Definitely, if English law required that a flotilla of vessels in a non-collision case would all have to be surrendered, where a common ownership existed, then that Court there would have required the surrender of all five barges in the tow and not the surrender of only two of the five barges.

POINT III.

In considering limitation situations involving an offending tug and an innocent tow, of common ownership, the line of cases distinguishing between contractual and quasi-contractual situations on one hand and tort situations on the other hand is sound and logical. The distinction is not tenuous and has been accepted by all eminent American authorities.

The distinction between "contract cases" and "tort cases" which this Court expounded in the decision in *Sacramento Nav. Co.* v. *Salz* (273 U. S. 326, 332), has been characterized by petitioners, in their brief, as "tenuous indeed" (Pet. Brief, p. 13).

That the distinction between actions based upon a contractual relationship and actions sounding in tort is real and vital has been affirmed by this Court in the past.

In the case of *Langford* v. *United States* (101 U. S. 341), this Court said, in disposing of a tortious seizure of certain buildings by government agents (wherein a claim that the seizure was essentially contractual was made to sustain jurisdiction of the Court of Claims):

> "This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, as well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."

A priori contractual or quasi-contractual relationship involves a mutual interdependence and reliance between two contracting parties. In imposing a higher valuation on limitation of petitioners' liabilities, the Courts have borne in mind the consideration that a party who entrusts its property to a tug-barge combination is relying upon the proper operation of that combination. This reliance is an essential element of the contractual re' ''onship between the parties. Also, a contract of employment, by which a person undertakes to engage himself in the service of a venture involves reliance. It is in this light that the Courts have reached decisions such as are exemplified in the cases cited by petitioner.

See (all "contract" cases):

The Big Chief, 75 F. Supp. 496 (ED Mo. 1948);

Standard Dredging Co. v. *Kristiansen*, 67 F. (2d) 548, 2nd Cir. 1933, cert. den. 290 U. S. 704 (1934);

The Bowling Green, 11 F. Supp. 109 (EDNY 1935).

Since this Court enunciated the clear rule to be found in the *Liverpool* case (*supra*), no United States Court in a "tort" case has required an innocent tow to be surrendered in addition to an offending tug as a prerequisite to limitation of the common owners' liability. The special consideration given to damage claimants who stand in a contractual relation with the vessel owner has not been found applicable to a stranger who is the victim of a tort.

See:

Sacramento Navigation Co. v. *Salz*, 273 U. S. 326, 332;

Standard Dredging Company v. *Kristiansen*, 67 F. (2d) 548, 551;

Goggin v. *United States*, 79 F. Supp. 812.

Robinson on Admiralty, 1939 Ed., page 928 states:

> "Thus the surrender of only the one vessel or the surrender of the fleet is made to depend upon the prior contractual relationships. In strictly tort cases only the one vessel is at stake; but if the transaction can be labeled 'contractual' the surrender required may go far beyond."

See also:

> *Benedict on Admiralty*, Vol. 3, 6th Ed., p. 408; 80 C. J. S. "Shipping", Sec. 242 (B), p. 1197.

The distinction which was accepted by the Second Circuit, and which petitioners imply to be unworkable, has thus been reiterated by both case law and textwriters, none of whom appear to have had any trouble over the years in applying that distinction or grasping the fundamental spirit underlying it, assertions of petitioner to the contrary.

CONCLUSION.

The petition herein establishes no conflict in decisions, raises no questions of wide import nor presents any reason for the exercise of this Court's supervision over the Federal judiciary system. It should be denied.

Respectfully submitted,

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